Office-Supreme Court, U.S.
FILED
MAY 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACKSONVILLE BULK TERMINALS, INC.,
HOOKER CHEMICAL CORPORATION, AND
OCCIDENTAL PETROLEUM CORPORATION,
Petitioners

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONERS

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Dated: May 14, 1981

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a union-instigated work stoppage motivated by its political disapproval of an employer's international trade relationships involves or grows out of a "labor dispute" within the meaning of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104.

2. Whether a federal district court has jurisdiction to enjoin a strike precipitated, at least in part, by a disagreement about the employer's authority to decide with whom it will do business, where the applicable collective bargaining agreement, containing a broad no-strike clause and a provision for mandatory and binding arbitration of all "matters under dispute" between the union and employer, expressly reserves to the employer complete control over the management of its business and direction of its work force.

3. Whether this Court should reconsider its decision in *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976), in light of its application by lower courts in situations that effectively deprive an employer of the benefit of the promise not to strike given by a union in return for the employer's commitment to arbitrate disputes between the parties.*

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* The following parties participated in the proceedings in the United States Court of Appeals for the Fifth Circuit: Jacksonville Bulk Terminals, Inc.; Hooker Chemical Corporation; Occidental Petroleum Corporation; International Longshoremen's Association; Local Union 1408, International Longshoremen's Association; Landon Williams, individually and as President of Local 1408; Melvin Andrews, individually and as Vice-President of Local 1408; Oliver Collins, individually and as Treasurer of Local 1408; Paul Fields, individually and as Business Agent of Local 1408; and all other members of Local 1408 of the International Longshoremen's Association, or of any other labor organization acting in concert with the named defendants.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 626 F.2d 455 and is reprinted at App., a 1-25, of the Appendix to the Petition herein. The opinion of the United States District Court for the Middle District of Florida, Jacksonville Division is not reported, and is reprinted at App., a 26-35, of the Appendix to the Petition herein.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on September 25, 1980. The Petition herein was filed on December 24, 1980 and granted on March 30, 1981.

STATUTORY PROVISIONS INVOLVED

This case involves the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 *et seq.*, and § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185. Pertinent provisions of the Norris-LaGuardia Act are set forth in their entirety at p. 2 of the Petition herein. Section 301(a) of the Labor Management Relations Act is set forth in its entirety at App., a 36 of the Petition herein.

STATEMENT OF THE CASE

Federal Jurisdiction

Petitioners, Jacksonville Bulk Terminals, Inc. ("JBT"), Hooker Chemical Corporation ("Hooker"), and Occidental Petroleum Corporation ("Occidental"), brought this action pursuant to § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a) against the International Longshoremen's Association, an affiliated local union and its officers and agents (the "Union"), for injunctive and other relief, as a result of the Union's instigation of a work stoppage allegedly in violation of the provisions of an effective collective bargaining agreement between JBT and the Union (J.A. 2).[1]

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[1] References to the appendices to the Petition herein are designated as "App., a —." References to the Joint Appendix are designated "J.A. —."

plete control over the management of its business and the direction of its work force:

> The Management of the Employer's business and the direction of the work force in the operation of the business are exclusively vested in the Employer as functions of Management. Except as specifically provided in the Agreement, all of the rights, powers and authority Employer had prior to signing of this Agreement are retained by Employer.

(J.A. 60).

On January 4, 1980, the President of the United States announced restrictions on certain trade with the Soviet Union in retaliation for that country's intervention in Afghanistan. Superphosphoric acid was not included in that Presidential embargo (J.A. 133).[3] The Union subsequently adopted a resolution urging its members to refuse to handle *any* cargo shipped to or from the Soviet Union (App., a 2-3). The Union acted upon this resolution by refusing to load three ships which arrived at JBT's Jacksonville terminal during the month of January, 1980, to receive SPA for transport to the Soviet Union.

In response to the Union's refusal to perform the work requested by JBT, Petitioners filed a complaint in the United States District Court for the Middle District of Florida, Jacksonville Division, pursuant to Section 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a). Petitioners alleged that the continued work stoppage violated the collective bargaining agreement, and that both damages and injunctive relief were appropriate.

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[3] On February 25, 1980, the embargo was extended to include SPA along with other products (App., a 7-8). On April 24, 1981, President Reagan lifted the embargo on SPA, as part of his decision to remove restrictions on the sale of grain to the Soviets. *See* 46 Fed. Reg. 23923 (April 29, 1981).

The Proceedings Below

1. *The District Court*

On February 1, 1980, the district court granted the employer's request for injunctive relief, and issued a preliminary injunction restraining the Union from calling, instigating, directing, encouraging or participating in any strike or work stoppage relating to the three vessels then in the Port of Jacksonville. The district court further ordered that the parties arbitrate their dispute in accordance with the terms of the collective bargaining agreement (App., a 26-27, 35). In its written opinion, the district court found that the underlying dispute between the parties was a political one. Accordingly, the court reasoned that the work stoppage was not a "labor dispute" within the meaning of § 13(c) of the Norris-LaGuardia Act, and that the issuance of an injunction was not precluded by § 4 of that statute (App., a 32-33). The court then concluded that injunctive relief was warranted according to traditional equity principles (App., a 33-35).

2. *The Appeals Court*

The Court of Appeals for the Fifth Circuit vacated the preliminary injunction. Because it found that the Union's work stoppage did "involve or grow out of a labor dispute" for purposes of the Norris-LaGuardia Act, even though the strike was politically motivated, the court was obliged to consider further whether the requested injunctive relief was warranted under the rationale of this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). The Fifth Circuit concluded that the *Boys Markets* exception to the Norris-LaGuardia Act was not applicable to this situation, because the underlying dispute precipitating the work stoppage was not arbitrable within the meaning of this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976) (App., a 21).

SUMMARY OF ARGUMENT

The Norris-LaGuardia Act limits the jurisdiction of federal courts in injunction actions growing out of a labor dispute. While that statute defines the term "labor dispute" broadly so as to encompass a wide range of disputes arising out of the employer-employee relationship, the legislative history of the Norris-LaGuardia Act as interpreted by this Court confirms that the Act is limited to situations in which the "employer-employee relationship [is] a matrix of the controversy." *Columbia River Packers* v. *Hinton*, 315 U.S. 143, 147 (1942). A clear thrust of judicial construction of the "labor dispute" provisions of the Norris-LaGuardia Act is that its anti-injunction prohibitions are limited to cases involving the "economic self-interest" of the union involved. *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line Railway Co.*, 362 F.2d 649-654 (5th Cir), *aff'd*, 385 U.S. 20 (1966).

The Fifth Circuit below thus incorrectly reversed the district court which had found the Norris-LaGuardia Act inapplicable to the instant controversy involving admittedly "purely political objectives." The district court properly followed existing precedent in holding that politically motivated union conduct is not within the scope of the Norris-LaGuardia Act; indeed, the Fifth Circuit's unarticulated conclusion that the Norris-LaGuardia Act applies is the only instance in which the Act has been held to extend to political conduct.

Not only is the result below unsupported by Norris-LaGuardia and its extensive judicial interpretation, the Fifth Circuit's decision disrupts the goals of federal labor policy. One of the primary goals of that policy is the encouragement of arbitration. This Court has recog-

nized that enforcement of collective bargaining agreements by both parties, as mandated by § 301 of the Labor Management Relations Act, 20 U.S.C. § 185, is fully consistent with that policy. *Boys Markets* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). The Court has also recognized definite limits on the protection afforded by the federal labor laws to politically motivated union conduct. *Eastex Inc.* v. *NLRB*, 437 U.S. 556 (1978).

Federal labor policy cannot be read to permit Norris-LaGuardia to be used to insulate a union from its contractual responsibilities in a case completely alien to the concerns of the Act.

The appellate court's decision also permits serious interference with the Government's execution of American foreign policy. The union has demonstrated a pattern of instigating political protests directed at various international news events, in complete disregard of the impact such conduct can have upon this country's relationships with foreign nations. The limited scope of the Norris-LaGuardia Act certainly cannot be interpreted as authorizing this kind of political activity by permitting a union to disregard its pledge not to strike "for any reason whatsoever." An employer confronted with a political strike is left without recourse, according to the Fifth Circuit, despite any previously obtained no-strike pledge. Norris-LaGuardia should not be extended to political controversies to condone such a result.

The Fifth Circuit erroneously concluded both that Norris-LaGuardia was applicable and that injunctive relief was precluded by this Court's decisions in *Boys Markets* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) and *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397 (1976). Assuming that those cases apply to a

political controversy such as this one, pre-arbitration injunctive relief should not be denied nonetheless. The work stoppage issue here was prompted by an arbitrable dispute between the parties, relating to a disagreement over the employer's right to choose its customers as part of its exercise of management prerogatives. The management rights clause in the parties' collective bargaining agreement clearly is capable of such an interpretation. Accordingly, the appellate court below erroneously ignored the presumption of arbitrability, *see Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368 (1974), and this Court's admonition in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S 574 (1960), that an order to arbitrate should not be denied unless it can be "said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 363 U.S. at 582-83.

Buffalo Forge does not alter this result. The parties' underlying dispute is arbitrable within the Court's intended meaning of that notion, in that the union's political disapproval of the Soviet military action in Afghanistan cannot be separated from the union's disapproval of Occidental's decision to choose the Soviet Union as a business partner. As a result, the underlying dispute in this case plainly involves a question of contractual interpretation that should be resolved by an arbitrator.

Buffalo Forge has, however, caused considerable confusion among the lower courts, as the decision of the Fifth Circuit below indicates. A major part of the difficulty caused by *Buffalo Forge* has been the application by certain lower courts of an overly mechanical interpretation of the concept of coterminous interpretation of no-strike and arbitration clauses.

If the Fifth Circuit's interpretation of *Buffalo Forge* is approved by this Court, it is clear, especially in light of other recent cases, that an employer is left without any effective remedy to enforce a claim that there has been a violation of a valid no-strike clause. For example, *Complete Auto Transit Inc.* v. *Reis*, 49 U.S.L.W. 4473 (May 4, 1981) severely restricts the availability of an employer's damages remedy under § 301. The holding of this case, when coupled with the Fifth Circuit's interpretation of *Buffalo Forge* in such a way as to negate judicial enforcement of collective bargaining agreements through the use of pre-arbitration injunctions, clearly deprives the employer of any opportunity to take action to effectively enforce the no-strike pledge.

Because this result is inconsistent with the objectives of national labor policy, the Court should take this opportunity to clarify *Buffalo Forge*. The Court's result there must be harmonized with the settled policy of federal labor relations favoring use of arbitration to resolve industrial disputes. That federal labor policy also requires that both parties to a collective bargaining agreement be able, equally, to enforce the terms therein.

ARGUMENT

I. A POLITICALLY MOTIVATED WORK STOPPAGE DOES NOT INVOLVE OR GROW OUT OF A LABOR DISPUTE WITHIN THE MEANING OF THE NORRIS-LAGUARDIA ACT AND A FEDERAL DISTRICT COURT IS NOT PRECLUDED FROM ENJOINING THAT WORK STOPPAGE

A. Congress Limited the Prohibitions of the Norris-LaGuardia Act to Controversies Involving "Labor Disputes"

The Norris-LaGuardia Act denies jurisdiction to a federal court to issue injunctive orders in cases "involving or growing out of any labor dispute."[4] The Act clearly defines a "labor dispute" in 29 U.S.C. § 13:

> [A]ny controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

This Court interpreted the Norris-LaGuardia Act's definition of the term "labor dispute" in *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, *rehearing denied*, 393 U.S. 902 (1968). In that case, the Court concurred with the lower courts' view that the key to

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[4] The specific language of § 4 of Norris-LaGuardia, 29 U.S.C. § 104, provides as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . .

whether a labor dispute exists under the Norris-LaGuardia Act is the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the [employers]." 391 U.S. 106.

In an earlier case, *Columbia River Packers* v. *Hinton*, 315 U.S. 143 (1942), the Court had also reviewed the term "labor dispute" as defined in § 13 of the Act and concluded:

> This definition and the stated public policy of the Act—aid to 'the individual unorganized worker . . . commonly helpless . . . to obtain acceptable terms and conditions of employment' and protection of the worker 'from the interference, restraint, or coercion of employers of labor'—make it clear that the attention of Congress was focused upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities.

315 U.S. at 145 (footnote omitted). While acknowledging in *Hinton* Congressional concern that the term be given an expansive reading in order to further the legislative intent of assisting the then nascent labor movement,[5] the Court cautioned that "the statutory

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[5] The stated policy of the Act, expressed in § 2, 29 U.S.C. § 102 is as follows:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and

classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." 315 U.S. at 146-47. The Court concluded by emphasizing that the Act's prohibitions are to be given full force only in those situations in which the "employer-employee relationship [is] the matrix of the controversy." 315 U.S. at 147.

Carroll and *Hinton* thus define the scope of the prohibitions of the Norris-LaGuardia Act to include only the range of cases related to the objective of the Act to stop the federal courts from interfering with the developing labor union movement.[6] At the same time, these cases confirm that the Norris-LaGuardia Act has no application in cases which involve underlying disputes outside the employer-employee relationship.

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conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

[6] *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 686 (1965) (Norris-LaGuardia Act limited to cases involving dispute regarding "terms or conditions of employment.") *Cf. Order of Railroad Telegraphers* v. *Chicago & North Western Railway Co.*, 362 U.S. 330, *rehearing denied*, 362 U.S. 984 (1960) (labor dispute found where union attempted to change their terms of an existing collective bargaining agreement); *Marine Cooks & Stewards* v. *Panama Steamship Co., Ltd.*, 362 U.S., *rehearing denied*, 363 U.S. 809 (1960) (labor dispute involved where unions picketed to protest substandard wages paid by foreign flagship owners).

The legislative history of the Norris-LaGuardia Act compelled this conclusion. The House Report advocating passage of the Act's anti-injunction provision explains that its purpose was "to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act . . . ." H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932), *quoted in Ashley, Drew & Northern Railway* v. *United Transportation Union*, 625 F.2d 1357, 1366 (8th Cir. 1980). Section 20 of the Clayton Act provides that a federal court cannot enjoin persons from "ceasing to perform any work or labor" in any case "between an employer and employees . . . involving or growing out of a dispute concerning terms or conditions of employment." 29 U.S.C. § 52. The influential promoters of the Act wanted to reverse restrictive court opinions, particularly *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921), which had restricted the protection of the Clayton Act to cases where the adversaries had a direct employer-employee relationship. F. Frankfurter & N. Greene, *The Labor Injunction* 217 (1930). As this Court recognized in *Hinton*, Congress enacted the Norris-LaGuardia Act to insure that federal courts would not enjoin labor disputes, thereby frustrating the efforts of workers seeking to organize themselves collectively, even if the participants in such disputes "do not stand in the proximate relation of employer and employee." *Columbia River Packers* v. *Hinton*, 315 U.S. at 146. *Accord, Bakery Drivers* v. *Wagshal*, 333 U.S. 437, 443 (1948).

In considering whether particular disputes are within the intended ambit of the Norris-LaGuardia Act, the lower courts have been guided by the Act's legislative history and this Court's opinions in *Hinton*, *Carroll*, and *Wagshal*. These lessons have generated the "economic self-interest test" to determine whether the controversy at issue constitutes a "labor dispute" within the meaning of § 13 of the Act. *E.g., Brotherhood of Railroad Train-*

men v. *Atlantic Coast Line Railway Co.*, 362 F.2d 649, 654 (5th Cir.), *aff'd*, 385 U.S. 20 (1966); *Ashley, Drew & Northern Railway* v. *United Transportation Union*, 625 F.2d 1357, 1366-67 (8th Cir. 1980), and cases cited therein. As one district court recently stated, the range of activities protected by the Norris-LaGuardia Act is defined by the "concrete economic interest of the parties." *Western Maryland Railroad Co.* v. *System Board of Adjustment*, 465 F. Supp. 963, 973 (D. Md. 1978).

Although the courts have adopted a very broad reading of the term "labor dispute" in cases where it was necessary to further the statutory interests of the Norris-LaGuardia Act,[7] they have readily acknowledged that the Act is inapplicable in a wide variety of situations involving labor unions. Thus, this Court found no labor dispute to exist in *Bakery Drivers* v. *Wagshal*, 333 U.S. 437 (1948). Relying on *Hinton*, the *Wagshal* court rejected the notion that a dispute between a bakery and a delicatessan over the time of bread deliveries constituted a labor dispute:

> To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, quality, delivery, payment, credit, or any other business transaction into a 'labor dispute.'

333 U.S. at 443.

Similarly, in *Drywall Tapers and Pointers Local 1974* v. *Operative Plasterers*, 537 F.2d 669 (2d Cir. 1976), the appellate court concluded that an action seeking injunc-

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[7] *See, e.g., Marriott Corp.* v. *Great America Service Trades Council*, 552 F.2d 176, 179 (7th Cir. 1977); *Corporate Printing Co.* v *New York Typographical Union No. 6*, 555 F.2d 18, 21 (2d Cir. 1977) and cases cited therein.

tive relief to enforce the terms of an agreement over work jurisdiction between two international unions did not arise out of a labor dispute within the meaning of the Act. The court stressed that the statute was designed to rectify certain specified abuses of employee rights to organize and designate representatives, and that the injunctive relief requested was not in the nature of the abuse sought to be remedied by the Norris-LaGuardia Act. 537 F.2d at 673-74. *See also Blankenship* v. *Boyle*, 329 F. Supp. 1089 (D.D.C. 1971) (action against trustees of union welfare found not governed by Norris-LaGuardia).[8] Likewise, in *Conley Motor Express, Inc.* v. *Russell*, 500 F.2d 124 (3d Cir. 1974), the Third Circuit followed *Columbia River Packers* v. *Hinton*, 315 U.S. 143 (1942), and found that picketing by independent truck owner-operators was enjoinable because the picketing did not arise out of a labor dispute within the meaning of Norris-LaGuardia, inasmuch as the employees had "failed to show that the employer-employee relationship form[ed] the matrix of their controversy . . . ." 500 F.2d at 127.[9]

There is no doubt, in light of the established law interpreting the Norris-LaGuardia Act, that its scope is limited. The statute, by its terms, its stated policy,

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[8] *Cf. National Association of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 919 (2d Cir. 1971) (§ 4 of the Norris-LaGuardia Act restricts federal jurisdiction "only in certain specified instances, particularly with regard to the enjoining of strikes, the joining of labor unions and the lawful aid to persons engaged in such activities.")

[9] *Accord, Betteroads Asphalt Corp.* v. *Federacion de Camioneros, Inc.*, 391 F. Supp. 1035 (D.P.R. 1975) (dispute between a group of independent businessmen attempting to take away the business of another group of businessmen not a labor dispute); *Nassau Sports* v. *Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972) (dispute over personal service contract not a labor dispute); *United States* v. *Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227, 236 (S.D.N.Y. 1960).

legislative history and subsequent judicial interpretation restricts the jurisdiction of federal courts only in cases in which the employer-employee relationship forms "the matrix of the controversy." *Columbia River Packers* v. *Hinton*, 315 U.S. 143, 147 (1942).

B. The Court of Appeals Improperly Extended the Proscriptions of the Norris-LaGuardia Act to a Purely Political Controversy

Cognizant of the clear meaning of the term "labor dispute" as used in the Norris-LaGuardia Act, the district court below held that the Union's refusal to handle cargo destined for the Soviet Union was not a controversy within the Act's definition of labor dispute. (App., a 26). In reversing the district court on this point, the Fifth Circuit misinterpreted both the statute and the relevant case law.

The district court properly relied on precedent holding that political disputes remarkably similar to the one in this case do not present "labor disputes" within the meaning of the Norris-LaGuardia Act. *West Gulf Maritime Association* v. *International Longshoremen's Association*, 413 F. Supp. 372 (S.D. Tex. 1975), *aff'd without opinion*, 531 F.2d 574 (5th Cir. 1976); *Harrington & Co., Inc.* v. *International Longshoremen's Association*, 356 F. Supp. 1079 (S.D. Fla. 1973); *Khedivial Line* v. *Seafarers' International Union*, 278 F.2d 49, 51 (2d Cir. 1960). *West Gulf* involved an earlier ILA protest against American grain shipments to the Soviet Union. Similarly, *Harrington* grew out of an ILA strike to protest the Bahamian Government's arrest of an ILA member. The courts in both cases found the disputes causing the strike to be political in nature. As the *Harrington* court noted, the ILA was not seeking to alter terms or conditions of employment, but merely to "dissent from the action of the Bahamian government." 356 F. Supp. at 1082. Both district courts then found injunctive relief appropriate.

In *Khedivial*, the Seafarers Union, together with the ILA, struck and picketed a cargo vessel owned by a private corporation residing in the United Arab Republic in retaliation for a blacklist instituted by that country against vessels that had carried cargo to Israel. Reversing the district court's denial of injunctive relief against the picketing, the Second Circuit found that Norris-LaGuardia was inapplicable, concluding that as broad "as the Act's definition of 'labor dispute' is, it is not broad enough to encompass" a dispute solely with the policies of the country of the shipowner. 278 F.2d at 51.

The Fourt Circuit reached a similar conclusion in *NLRB* v. *International Longshoremen's Association (Ocean Shipping)* 332 F.2d 992 (4th Cir. 1964). In that case, the court found that the ILA's refusal to load ships trading with Cuba was not a "labor dispute" within the meaning of § 2(9) of the National Labor Relations Act, 29 U.S.C. § 152(9).[10] The Fourth Circuit gave the following reasoning in reaching its conclusion that no "labor dispute" was involved:

> Essentially, Ocean's grievance relates to actions of ILA which are political in nature. As the NLRB found, ILA was implementing a 'clearly defined policy calculated to eliminate trade with Cuba.' Dissatisfaction with ILA's policy of refusing to work ships that have engaged in trade with Cuba does not constitute a controversy grounded in the 'terms

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[10] The definition of "labor dispute" in § 2(9) of the National Labor Relations Act is almost identical to the operative definition of "labor dispute" under § 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (App., a 36), the two provisions should be construed consistently with one another. *See National Maritime Union* v. *NLRB*, 342 F.2d 538, 541 (2d Cir.), *cert. denied*, 382 U.S. 835, *rehearing denied*, 382 U.S. 933 (1965).

> and conditions of employment.' Not every activity of a labor organization, not even every controversy in which it may become involved, is a 'labor dispute' within the statutory meaning. *Cf. N.L.R.B.* v. *Miranda Fuel Co.*, 326 F.2d 172, 180 (2d Cir. 1963). Terms and conditions of employment are not in dispute here. The union activity here pertains to a general political question, in which ILA shares an interest with all citizens. It is not seeking to alter any terms or conditions of employment.

332 F.2d at 995-96.

With the singular exception of the Fifth Circuit decision in the instant case, there has been no instance in which the Norris-LaGuardia Act has been deemed applicable in a politically-motivated work stoppage. The Fifth Circuit below relied on an earlier Fifth Circuit opinion in *United States Steel Corp.* v. *United Mine Workers*, 519 F.2d 1236 (5th Cir. 1975), *rehearing denied*, 526 F.2d 376, *cert. denied*, 428 U.S. 910 (1976) in resolving this issue (App., a 15-16). A careful reading of *U.S. Steel*, however, reveals that the question of the applicability of Norris-LaGuardia in that case was not at issue and consequently never addressed. 519 F.2d at 1241-42. Indeed, the court in *U.S. Steel* expressly stated that the case was "argued on a *Boys Markets* theory," 519 F.2d at 1247 n.23; thus, the applicability of Norris-LaGuardia was merely assumed.

In short, the Fifth Circuit provided no rationale in support of its decision to ignore relevant precedent and decide that the Norris-LaGuardia Act applies to a case not involving a labor dispute. Indeed, the Act plainly does not support the appellate court's extension of its prohibitions to a situation involving a purely political controversy. The employer-employee relationship has nothing whatsoever to do with motivating the Union's work stoppage; there similarly is no basis for extending the terms of the Norris-LaGuardia Act to a dispute completely unrelated to the abuses sought to be remedied by the Act.

C. The Appellate Court's Decision Seriously Undermines The Objectives Of National Labor Policy

In addition to being an unprecedented and unintended extension of the Norris-LaGuardia Act, the Fifth Circuit's opinion directly contravenes the well-settled objectives of national labor policy. The practical effect of the decision below is to leave the employer completely helpless in the face of a political strike. The Fifth Circuit's refusal to permit an employer to enforce a no-strike pledge in a situation where the employer is absolutely powerless to do anything to resolve the international situation giving rise to the work stoppage is intolerable. National labor policy clearly favors the enforcement of collective bargaining agreements by both parties, *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), and this Court has never authorized a political strike in complete disregard of contractual obligations. *Cf. NLRB* v. *Sands Manufacturing Co.*, 306 U.S. 332 (1939). Expanding the prohibitions of the Norris-LaGuardia Act to insulate a union from its contractual obligations twists that statute into a heretofore unrecognizable shape. Moreover, there is absolutely nothing in the fifty year history of Norris-LaGuardia to suggest that it can be used by a union to evade responsibility for actions completely unrelated to the purposes for which the statute was enacted.

Conscious of the goals of national labor policy, this Court has recognized decided limits to the range of politically-motivated union activity. Thus, the Court has employed the economic self-interest analysis applicable here to the Norris-LaGuardia Act issue to resolve the closely-related question of whether politically-motivated conduct by employees is protected activity within the meaning of the "mutual aid and protection" clause of § 7 of the National Labor Relations Act, 29 U.S.C. § 157. In *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), this Court observed

that "[t]here may well be types of conduct or speech that are so purely political or so remotely connected to the concerns of employees as employees as to be beyond the protection of § 7." 437 U.S. at 570 n.20.[11] The Court further stated that "[o]ther laws . . . may place limits on concerted activity in the legislative and political spheres." *Id.* at 566 n.16.

Following that analysis, the D.C. Circuit recently affirmed a National Labor Relations Board decision holding that § 7 did not protect employees who sought to hand out leaflets urging other employees to vote for particular candidates whose positions on issues were favorable to organized labor. *Auto Workers Local 174* v. *NLRB*, 106 L.R.R.M. 2561 (D.C. Cir., March 3, 1981). The key to the court's resolution of *Auto Workers* was the conclusion that the leaflets were designed to "induce employees to vote for specific candidates, not to educate them on political issues relevant to their employment condition." 106 L.R.R.M. at 2563. The analogy between the Union's conduct in this case and that involved in *Auto Workers* is patent; neither controversy involved the economic self-interest of the union, or arises from the matrix of an employer-employee relationship.

Furthermore, the appellate court's suggestion in *Auto Workers* that the question of whether specific conduct is "purely political" or directed at improving terms and conditions of employment is best analyzed as a continuum, 106 L.R.R.M. at 2564, provides a useful way of analyzing the conduct at issue here. Certainly, when viewed as part of a spectrum running from the "purely

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[11] The *Eastex* opinion leaves no doubt about the close relationship between § 7 of the National Labor Relations Act and the Norris-LaGuardia Act; in *Eastex*, the Court observed that § 7 was "modeled" after the language of § 2 of Norris-LaGuardia in an effort to protect the right of wage earners "to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally." 437 U.S. at 566 n.14.

political" to the "directly related to terms and conditions of employment," the Union's Russian cargo boycott falls extremely close to the "purely political" end of that spectrum. The Union has consistently admitted and the Fifth Circuit found that the dispute "was not motivated by any hope for economic gain or by any dispute with any employer members, but was purely a political protest." (App., a 3).

As in *Eastex*, this case calls for a balancing of the right of the employer to expect that a union will abide by a freely-given no-strike pledge against the political objectives of the Union. Striking that balance, in light of the objectives of national labor policy, is not difficult in the instant case where, unlike *Eastex*, the striking employees confess to no objective at all related to the employer-employee relationship.

That purely political activity on the part of unions finds no protection under federal labor law is further confirmed by the acknowledgement of both the National Labor Relations Board and reviewing courts that the collective bargaining process is similarly confined to matters within the economic self-interest of the employees. Thus, the Labor Board has consistently held, for example, that the issue of an industry promotion fund, to which employers make payments for the general promotion and betterment of a particular industry, is not a mandatory subject of bargaining under § 8(d) of the Act, because, in the words of the Eighth Circuit, "[i]ndustry promotion funds do not encompass any aspect of the employer-employee relationship." *NLRB* v. *Laborers' Local 264*, 529 F.2d 778, 786 (8th Cir. 1976). *Accord, NLRB* v. *Detroit Resilient Floor Decorators' Local 2265*, 317 F.2d 209, 270 (6th Cir. 1963); *Sheet Metal Workers' Local No. 38 (Elmsford Sheet Metal Works)*, 231 N.L.R.B. 699 (1967). *See also Globe Cotton Mills* v. *NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

The limits put on political activity by federal labor policy were recently reaffirmed by the First Circuit in *Allied International, Inc.* v. *ILA*, 640 F.2d 1368 (1st Cir. 1981), *petition for cert. filed*, 49 U.S.L.W. 3763 (April 3, 1981), No. 80-1663. Rejecting the argument that the ILA is immune from "secondary boycott" [12] liability resulting from the same boycott at issue here, the court found the absence of a "labor dispute" very significant:

> We think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity. *Cf. NLRB* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F.2d 149, 152 (9th Cir. 1954) (boycott ordered "not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, . . . would appear even more reprehensible."). The labor laws do not confer upon bargaining representatives a voice in the conduct of foreign policy. The fact that there have been few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute" illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. . . . The potential danger of uncontrolled, whimsical activity is obvious. It must be remembered that a union's ability to apply crippling secondary pressure is greatly enhanced by its position under the federal labor laws; without even the justification of a labor-oriented motive, such forbidden secondary activity is *a fortiori* precluded.

640 F.2d at 1378 (footnotes omitted).

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[12] Section 8(b)(4) of the Labor Management Relations Act, 29 U.S.C. § 158(b)(4), generally prohibits a union from engaging in coercive conduct against neutral employers in order to apply additional pressure on an employer with whom the union has a dispute.

Politically-motivated conduct of the kind involved in this case plainly should not enjoy the protection of the Norris-LaGuardia Act. The heretofore consistent application of national labor policy has never recognized that a union is permitted to disrupt otherwise stable employment relationships in support of "random political objectives." The Fifth Circuit's opinion in this case improperly ignores and seriously upsets the careful balance between labor and management which is the goal of national labor policy.

D. The Fifth Circuit's Opinion Permits Intolerable Interference With The Government's Formulation Of Foreign Policy.

This case also raises serious questions concerning interference with American foreign policy. At the time of the work stoppage in the instant case, Occidental's shipment of SPA to the Soviet Union was fully consistent with the foreign trade policy of the United States (J.A. 133). Recently, as noted above, the embargo covering SPA has been lifted by the President. *See* 46 Fed. Reg. 23923 (April 29, 1981). It is quite clear, however, that the Union has demonstrated a definite proclivity to substitute itself for the Executive Branch of the federal government in attempting to influence and direct the foreign policy of the United States. *See Harrington & Co., Inc.* v. *International Longshoremen's Association*, 356 F. Supp. 1079 (S.D. Fla. 1973) (protest against Bahamian government); *West Gulf Maritime Association* v. *International Longshoremen's Association*, 413 F. Supp. 372 (S.D. Tex. 1975), *aff'd without opinion*, 531 F.2d 574 (5th Cir. 1976) (protesting 1975 grain sales to the Soviet Union); *Khedivial Line* v. *Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960) (protesting United Arab Republic's boycott of Israel); *NLRB* v. *International Longshoremen's Association (Ocean*

Shipping), 332 F.2d 992 (4th Cir. 1964) (protesting Castro's revolution in Cuba.) Indeed, these forms of political protest have continued over the course of the last two years, as the Union, stirred to anger by one international incident after another, has threatened to boycott cargo destined to or from Iran, Poland, and Great Britain. *See N.Y. Times*, Nov. 10, 1979, at 7, col. 2 (Iranian boycott); *N.Y. Times*, Aug. 21, 1980, at 10, col. 6; *N.Y. Times*, Aug. 28, 1980, at 7, col. 1 (Polish boycott); [1981] Daily Lab Rep. (BNA) A-9-10 (May 7, 1981) (British Boycott).

It need hardly be stated that such unpredictable conduct necessarily undermines the reasoned resolution of delicate issues involved in foreign policy, and can very well cause serious disruption in our relationships with countries abroad. The clear impact of the Fifth Circuit's opinion is that a union is permitted to pursue its whimsical political objectives by means of strikes and boycotts, irrespective of the impact of such conduct on both domestic labor relations policy and American foreign policy. Congress certainly did not intend the Norris-LaGuardia Act to provide a union with this kind of *carte blanche*.

The narrow question at issue here therefore is whether the Norris-LaGuardia Act removes a federal court from having jurisdiction to consider a request for injunctive relief against this type of political conduct, in a situation where the employer claims that the work stoppage violates a contractual no-strike provision contained in a collective bargaining agreement. Congress plainly did not intend to permit a union to evade its responsibilities under a collective bargaining agreement in such a manner. Furthermore, the Norris-LaGuardia Act should not be found to deny federal court jurisdiction over a dispute precipitated by a controversy having nothing whatsoever to do with the matrix of the employer-employee relationship.

II. PROPER DEFERENCE TO THE PRESUMPTION OF ARBITRABILITY AND THE POLICIES UNDERLYING NATIONAL LABOR MANAGEMENT RELATIONS POLICY SUPPORTS THE ISSUANCE OF INJUNCTIVE RELIEF IN THIS CASE

Having decided that the dispute between the Union and Occidental was within the scope of the Norris-LaGuardia Act, the Fifth Circuit concluded that injunctive relief was unwarranted under the criteria established by this Court in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) and *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976). The Fifth Circuit determined that the dispute underlying the strike was the Soviet invasion of Afghanistan, and that such disputes could not be arbitrated under the parties' collective bargaining agreement (App., a 21a). Should this Court determine that the Union's work stoppage does constitute a labor dispute under Norris-LaGuardia, it should affirm nonetheless the propriety of the district court's injunction because the court of appeals misapplied the principles enunciated by this Court in *Boys Markets*.

Those principles stress the importance of arbitration as a substitute for industrial strife in resolving labor management disputes. Central to furtherance of arbitration in labor disputes is the oft-quoted "presumption of arbitrability" articulated by this Court. *See United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Relying on those principles, Occidental argued that injunctive relief under *Boys Markets* was appropriate in the instant case, assuming the parties' dispute was found subject to the Norris-LaGuardia Act, because of the existence of a management rights clause in the contract between JBT and the Union. That provision states:

> The Management of the Employer's business and the direction of the work force in the operation of the business are exclusively vested in the Employer as functions of Management. Except as specifically

> provided in the Agreement, all of the rights, powers and authority Employer had prior to signing of this Agreement are retained by Employer. (J.A. 60).

This language recognizes JBT's right to direct the work force and operate its business. Choosing one's customers is obviously a necessary aspect of management's "operation of the business," or else the employer could have that very fundamental aspect of decision-making dictated to him. The Union's boycott thus was translated into a disagreement over Occidental's choice of a particular customer. A dispute of this nature plainly involves interpretation of the management rights clause in the parties' collective bargaining agreement. The appellate court declined, however, to analyze that contention, and simply concluded that the Union's grievance was not "a complaint against JBT doing business with the Soviets," but "a complaint against the actions of the U.S.S.R. itself." (App., a 21).

This Court's decision in *Boys Markets* does not permit such a result. In that case, the Court set out to accommodate the potentially conflicting statutory language and policies underlying the Norris-LaGuardia Act and § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), which authorizes suits for violation of contracts between an employer and a labor organization. In accommodating the two acts, the *Boys Markets* Court was influenced by the proarbitration policy established by this Court in the *Steelworkers* trilogy,[13] noting that its reason for reconsidering *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), was that its holding stood "as a significant departure from our otherwise consistent emphasis upon the congressional policy to

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[13] *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

promote the peaceful settlement of labor disputes through arbitration . . . ." 398 U.S. at 241. Thus, the *Boys Markets* Court, given a no-strike provision in the contract between the parties, permitted the issuance of an injunction against a strike by the union pending arbitral resolution of the underlying dispute.

The Fifth Circuit, however, paid scant attention to this policy. Rather than acknowledging that the presumption of arbitrability extends to § 301 injunction actions, *see Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368 (1974), the appellate court ignored this Court's admonition in *Warrior & Gulf* that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not suspectible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" 363 U.S. at 582-83 (footnote omitted) (emphasis added). Instead of furthering the policy favoring arbitration as the method of resolving such disputes, the Fifth Circuit impermissibly decided *on the merits* that the dispute underlying the Union's work stoppage was not arbitrable, effectively usurping the arbitrator's role as the interpreter of the collective bargaining agreement. *See generally United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Fifth Circuit compounded its error by concluding that *Buffalo Forge* precluded injunctive relief in this case (App., a 20-21). *Buffalo Forge* held that a particular type of work stoppage, a sympathy strike in support of a grievance by other employees that was not arbitrable between the union and the employer, was not enjoinable prior to arbitration. 428 U.S. at 403-04. *See Complete Auto Transit* v. *Reis*, 49 U.S.L.W. 4473, 4477 (May 4, 1981) (Powell, J., concurring in part and concurring in judgment). The Court's conclusion in *Buffalo Forge* that the employer would not be deprived "of its bargain," 428

U.S. at 408, must be tested in this case in the context of the scope of the entire collective bargaining agreement between the parties.

A review of the parties' entire bargaining agreement demonstrates that the employer was deprived of its bargain by the denial of injunctive relief. Although the Union's work stoppage was intended primarily as a protest against the Soviet intervention in Afghanistan, it had, in addition, both the purpose and effect of precluding Occidental from doing business with the Soviet Union. That the protest resulted in curtailment of trade relations between Occidental and the Soviet Union is evident from the facts of the instant case. Moreover, that the Union intended this result becomes evident upon consideration of the fact that the Union would have had no means of publicizing its disapproval of the Soviet military action or penalizing the Soviets for such action, without putting pressure on those American companies which were trading with the Russians. The Union took action against Occidental only because of its decision to do business with the Soviets; absent the trade agreements with the Soviet Union, the Union would not have engaged in any work stoppage against JBT. Thus, in effect, the Union extended its dispute with the Soviets to include all employers which continued to do business with the Soviet Union.

The Union's work stoppage, as stated above, thus prompted a disagreement as to Occidental's choice of customers, inasmuch as that question is inseparable from and inextricably related to the Union's opposition to the Soviet Union. Had the Union wanted to limit its protest to opposition to the Soviets, it could readily have done so without involving JBT.

Not only does this fact make the underlying dispute an arguable question of interpretation of the management rights clause, a close look at other relevant provisions in the contract compels the conclusion that the

Fifth Circuit reasonably could not have "said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf*, 363 U.S. at 582-83.

The parties' arbitration provision makes it clear that any disagreement the Union might have had with regard to JBT's perception and exercise of its management right was subject to mandatory arbitration pursuant to paragraph 15(B) of the collective bargaining agreement. That procedure specifically covers all "matters under dispute which cannot be promptly settled between the local and an individual Employer." (J.A. 62). The grievance and arbitration procedure in no way limits the kinds of disputes which may be brought forward. Thus, there is no basis for any inference against the arbitrability of any dispute of any kind, much less one which so directly concerns the scope of management's prerogative in deciding with whom it will do business.

In partial exchange for the employer's promise to arbitrate all "matters under dispute," the Union promised that they would forebear engaging in "any strike of any kind of degree whatsoever . . . for any cause whatsoever" during the term of the contract (J.A. 61).[14] Accordingly, the Union's work stoppage in this case was "over" an arbitrable issue inasmuch as it involved a disagreement over the application of the management rights provision, which on its face gives to JBT alone the right to decide with whom it does business.[15]

Recalling the Court's admonition that "doubts [as to arbitrability] should be resolved in favor of coverage,"

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[14] It must be remembered though, as the Court stressed in *Gateway Coal*, that consideration of no-strike and arbitration provisions are analytically distinct. 414 U.S. at 382.

[15] Significantly, arbitrators have already determined in the companion case to this one, that the ILA boycott violates contractual no-strike provisions (App., a 22-23).

Warrior & Gulf, 363 U.S. at 582-83, and the express extension of the presumption of arbitrability to injunction actions, it is thus clear that the Fifth Circuit erred in deciding that the dispute underlying the work stoppage was not arbitrable and that injunctive relief was accordingly not appropriate on the facts of this case. It is impossible in this case to state "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.*

This is an ideal case for the application of the presumption in favor of arbitrability. Arbitrators are routinely called upon to interpret the scope of management rights clauses in the context of many different industrial disputes over the exercise of managerial prerogative. *See e.g., Ingersoll-Rand Co.*, 70-1 Lab. Arb. Awards ¶ 8421 (1969) (Teple, Arb.); *Mead Corp.*, 64 Lab. Arb. & Disp. Settl. 421 (1975) (Ferguson, Arb.); *Videotape Productions of New York*, 68-2 Lab. Arb. Awards ¶ 8728 (1968) (Turkus, Arb.); *Trojan, Inc.*, 1975 Lab. Arb. Awards ¶ 8124 (1975) (Sherman, Arb.).

The Fifth Circuit's decision is further flawed by its lack of appreciation of the policy considerations underlying *Boys Markets*. *Boy Markets* represents an accommodation of Norris-LaGuardia and § 301. 398 U.S. at 250. The Court's decision in *Buffalo Forge* is best understood when it is remembered that federal court injunctions against sympathy strikes were one of the very evils sought to be remedied by the Norris-LaGuardia Act. *See generally* F. Frankfurter & N. Greene, *The Labor Injunction* (1930). As already established, however, that statute has no application in this case. Injunctive relief herein thus would do no violence to the policies of Norris-LaGuardia, and *Buffalo Forge* is therefore easily distinguishable.

Accordingly, the Union's strike prior to arbitration evaded the employer's right to arbitration and thus

operated to deprive the employer of its bargain. The Fifth Circuit misapplied the principles of *Boys Markets* and *Buffalo Forge* and effectively negated the policy underlying § 301 as expressed by this Court in its statement that "unions as well as employers should be bound to collective bargaining agreements . . . [and there should be] . . . a procedure for making such agreements enforceable in the courts." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957).

III. THE OVERLY-EXPANSIVE INTERPRETATION GIVEN TO THIS COURT'S DECISION IN *BUFFALO FORGE* BY THE APPELLATE COURT IS INCONSISTENT WITH THE GOALS OF NATIONAL LABOR POLICY

This case can be resolved without reference to this Court's decision in *Buffalo Forge*. Should the Court decide, however, that the case does involve a labor dispute within the ambit of the Norris-LaGuardia Act's anti-injunction prohibitions, the correctness of the appellate court's interpretation of *Boys Markets* and *Buffalo Forge* must be tested. In that event, Occidental urges the Court to clarify its holding in *Buffalo Forge*, because the Fifth Circuit's decision below demonstrates that the lower courts are applying *Buffalo Forge* in a manner that seriously undermines the goals of national labor policy.

The Court in *Buffalo Forge* held that the Norris-LaGuardia Act precluded the issuance of a pre-arbitration injunction in a case involving a sympathy strike, on the strength of the majority's conclusion that the strike was not "over" an arbitrable grievance. 428 U.S. at 403-04. *See Complete Auto Transit* v. *Reis*, 49 U.S.L.W. 4473, 4477 (May 4, 1981) (Powell, J., concurring in part and concurring in judgment). The majority reasoned that *Boys Markets* injunctive relief should not be available in a situation where the dispute underlying the strike was not arbitrable, because the *Boys Markets* exception to Norris-LaGuardia, which was premised on the

policy favoring resolution of industrial disputes through arbitration, would be inapplicable in such a case. 428 U.S. at 407-11.

The Court left unresolved in *Buffalo Forge* the meaning of the requirement that a strike be "over an arbitrable grievance." The meaning of this requirement was further obscured by the Court's statement that a disagreement about the scope of a contractual no-strike clause would not constitute an "arbitrable grievance" warranting consideration of injunctive relief. Thus even though the question of the legality of a strike *vis à vis* the no-strike clause is an arbitrable issue, the Court in *Buffalo Forge* interposed the requirement that there be an additional arbitrable issue underlying the strike. 428 U.S. at 406-09.

Developments since *Buffalo Forge* make it clear that the Court's concern for effectuating a policy in favor of arbitration has overshadowed the concomitant principle underlying § 301(a), *viz.*, that collective bargaining agreements should be enforceable by both parties in federal court. Indeed, this case graphically demonstrates the absolute helplessness of an employer confronted with a strike that is, if the Fifth Circuit is to be believed, precipitated by a non-arbitrable dispute. This Court's decision in *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212 (1979), holds that a parent union normally is not obligated to take affirmative steps to prevent or terminate a wildcat strike. Obviously this holding severely restricts an employer's ability to pursue effectively a claim for damages under § 301. More recently, in *Complete Auto Transit* v. *Reis*, 49 U.S.L.W. 4473 (May 4, 1981), the Court foreclosed relief in damages against individual employees in wildcat strikes.

Ironically, both *Carbon Fuel* and *Complete Auto Transit* suggest that an employer take some solace from the availability of other remedies, including the right to seek injunctive relief against such a strike, or to take dis-

ciplinary action against the striking employees.[16] Yet, *Buffalo Forge* seemingly prohibits an employer from seeking injunctive relief unless the strike is over an arbitrable dispute. Precluding such a remedy is particularly harsh where, as here, the employer is powerless to do anything to resolve the underlying dispute. Permitting a union to violate a no-strike clause with impunity whenever international events take an unpleasant turn, while at the same time denying the employer the right to effective enforcement of that no-strike pledge, seriously distorts the policy of § 301 in favor of enforcement of collective bargaining agreements by both parties. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. at 449.

The legislative history of § 301 demonstrates that the Congress was concerned with redressing the balance of power in collective bargaining because of a wave of labor unrest caused by strikes during the term of collective bargaining agreements containing no-strike clauses. *See Complete Auto Transit* v. *Reis*, 49 U.S.L.W. at 4477 (Powell, J., concurring in part and concurring in the judgment). The decision of the Fifth Circuit in the instant case, demonstrates that this balance has once again slipped, with employers caught in a "lawless vacuum" due to an absence of remedies available to enforce a no-strike pledge. *Id.* at 4478 (Powell, J., concurring in part and concurring in the judgment).

Buffalo Forge has occasioned considerable confusion among the lower courts about their proper role in reviewing a request for *Boys Markets* relief. The result feared by the *Buffalo Forge* majority, *i.e.*, "massive" entry by the courts into the business of contract inter-

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[16] Not only is it questionable whether pursuing discipline is an effective means of ending a wildcat strike, let alone consistent with national labor policy, confusion caused by *Buffalo Forge* has prompted the National Labor Relations Board to restrict the availability of that remedy as well. *See* pp. 39-40 n. 19, *infra*.

pretation, has occurred. 428 U.S. at 414.[17] Indeed, a major by-product of the Court's decision has been the fact that courts have been forced to carefully analyze and interpret the parties' contract to determine whether a given strike is actually over an arbitrable issue. This task of judicial contract interpretation occurs with great frequency and with decidedly unpredictable results.

The one point about which the lower courts have had the most difficulty is in interpreting the *Buffalo Forge* articulation of the *quid pro quo* theory. 428 U.S. at 407. The Third Circuit's decision in *Delaware Coca-Cola Bottling Co.* v. *Teamster Local 326*, 624 F.2d 1182 (3d Cir. 1980), is illustrative. There, the appellate court reversed an award of damages against the union as a result of a "sympathy strike" during the term of the parties' collective bargaining agreement, which, according to the district court's opinion, had violated § 301(a). Despite the fact that the contractual no-strike clause at

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[17] At least one commentator critical of *Buffalo Forge* has questioned this premise as follows, arguing that the Court:

> [O]verlooked the fact that trial courts possess sufficient authority to avoid both a determination of the merits of no-strike obligations and the abuses of power associated with the labor injunctions of the past. The injunction need be nothing more than an order preserving the status quo pending an arbitral determination of the merits of a claimed breach of an express or implied no-strike obligation. Preserving the status quo is one of the traditional functions of equity, and an order requiring expedited arbitration should be a sufficient safeguard against the status quo order becoming, in effect, a final determination of the right to strike or respect a picket line.

Smith, The Supreme Court, *Boys Markets* Labor Injunctions and Sympathy Work Stopages, 44 U. Chi. L. Rev. 321, 346-47 (1977) (footnotes omitted). *Cf.*, Cox, "Current Problems in the Law of Grievance Arbitration," 30 Rocky Mount. L. Rev. 247, 256 (1958) ("Making an exception [to Norris-LaGuardia] for strikes in breach of contract would carry out a fairly specific legislative enactment without inviting judicial determination of labor policy.").

issue was very broad, the Third Circuit found it ineffective as a waiver of the right to engage in a sympathy strike. 624 F.2d at 1185. The court reached that conclusion by resort to the principle of coterminous application of no-strike and arbitration provisions, derived from *Buffalo Forge*. Indeed, the *Delaware Coca-Cola* court followed *Buffalo Forge* to hold that it would apply the *quid pro quo* theory of coterminous interpretation, even where there is an express no-strike clause in the contract, absent some contrary evidence. The court assumed that "normally the employer will not agree to arbitration unless he gets an agreement from the union that it will not strike *over those arbitrable issues*." 624 F.2d at 1186 (emphasis added). Applying this reasoning, the Third Circuit reversed the lower court's award of damages, concluding that the union's strike action did not violate the contractual no-strike clause. *Accord, United Steelworkers* v. *Fort Pitt Steel Casting*, 635 F.2d 1071, 1077-78 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3727 (March 16, 1981). *Contra, Iowa Beef Processors, Inc.* v. *Amalgamated Meat Cutters*, 597 F.2d 1138, 1145 (8th Cir. 1979), *cert. denied sub nom., Amalgamated Meatcutters* v. *Iowa Beef Processors, Inc.*, 444 U.S. 840 (1979).

This kind of judicial experience calls into question the notion that the agreement not to strike is always the *quid pro quo* for the promise to arbitrate, and that those two provisions should be given coterminous application. *Buffalo Forge*, 428 U.S. at 414, *cf. Gateway Coal* v. *United Mine Workers*, 414 U.S. 368, 382 (1974). Numerous cases involving employer damage actions and employer discipline of strikers in sympathy strikes attest to the fact that a union's agreement to a broad no-strike clause often does include an obligation not to engage in sympathy strikes. *See* Cantor, "*Buffalo Forge* and Injunctions Against Employer Breaches of Collective Bargaining Agreements." 1980 Wisc. L. Rev. 247, 253 n.35 and cases cited therein. It is also true that a large num-

ber of collective bargaining agreements contain some exceptions to the union no-strike obligation. *See* Feller, "A General Theory of the Collective Bargaining Agreement," 61 Calif. L. Rev. 663, 758 (1973).

In this context it is clear that contractual no-strike clauses are not simply "*quid pro quos*" for contractual grievance arbitration procedures. *Cf. Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957). While this may have been how such no-strike provisions historically developed, Feller, 61 Calif. L. Rev. at 757, it is not necessarily true today. *Id.* at 758. As this Court expressly recognized in *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 382 (1974), contractual no-strike and arbitration clauses present two "analytically distinct" issues each of which "depends on the intent of the contracting parties." Commentators critical of *Buffalo Forge* have questioned the Court's apparent assumption that the parties to the collective bargaining agreement there had "bargained for" judicial enforcement of a no-strike clause "only when there was a strike over an arbitrable issue." Gould, "On Labor Injunctions Pending Arbitration: Recasting *Buffalo Forge*," 30 Stan. L. Rev. 533, 548 (1978). *See also* Cantor, 1980 Wisc. L. Rev. at 249 and authorities cited therein.

The instant case demonstrates how the assumption made in *Buffalo Forge* can deprive the employer of his bargain. Here the parties agreed to a broad no-strike clause prohibiting work stoppages "for any reason whatsover." Certainly, JBT's expectation was that its bargain would insure uninterrupted operations in circumstances other than sympathy strikes. This expectation, however, was plainly frustrated. *Cf. Textile Workers* v. *Lincoln Mills*. When the union struck in protest of the company's decision to continue to do business with the Soviet Union, the company was denied injunctive relief pursuant to *Buffalo Forge*. The court, applying *Buffalo Forge*, held that the no-strike clause would be equitably

enforced only to the extent the strike arose over an arbitrable dispute. The fact that the employer had bargained for and received a far broader no-strike commitment was disregarded.

Lower court difficulties with issues of contract interpretation extend, however, beyond the questionable assumption of coterminous interpretation. In many other situations, federal courts have, as in this case, assumed the arbitrator's role, by improperly deciding that certain "underlying" grievances were not arbitrable.

For example, in *Design & Manufacturing Corp.* v. *Auto Workers, Local 2042*, 608 F.2d 767 (7th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980), the union went on a sympathy strike over transfer of work from a struck plant to another plant of the company. The employer obtained federal district court injunctive relief on the grounds that the issue, movement of work, was a matter subject to the contract's arbitration clause. On appeal, however, the Seventh Circuit engaged in a lengthy analysis of the parties' contract in order to determine whether the strike was really over an arbitrable issue. Following this analysis, the court concluded that "nothing in the [parties'] collective bargaining agreement prevents the movement of such work between plant locations," 608 F.2d at 770. Disagreeing with the district court which interpreted the contract differently to find the dispute arbitrable, the Seventh Circuit reasoned that the case involved only a dispute over the application of the no-strike clause. *Id.*[18]

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[18] The Seventh Circuit's opinion suggests the clearly anomalous result that the question of an arbitrable dispute for purposes of *Buffalo Forge* depends on the location of certain language in particular clauses of the contract; the court's opinion implies that had the language regarding transfer of work appeared elsewhere in the contract and not in the sympathy strike provision, that injunctive relief would have been appropriate. 608 F.2d at 770.

Likewise, in *Waller Brothers Stone Co.* v. *United Steelworkers*, 620 F.2d 132 (6th Cir. 1980), both the trial and appeals court were forced to engage in a complicated analysis of the parties' contract to determine whether a strike in that case was over an arbitrable issue. When the company purchased a new machine to help pack stone in a stone quarry, the union argued that it was entitled to negotiate a new wage rate for employees operating this machine. The company on the other hand contended that work on this machine was simply part of the overall job function of "craters," employees who packed stone, and that people working on this machine should simply be paid the "crater" wage rate. When the union struck, the district court held that the dispute involved the function and scope of the crater job and then, interpreting the contract, found that this was an arbitrable matter. Consequently, the court enjoined the strike pending arbitration. The Sixth Circuit reversed, acknowledging, however, that the arbitrability of the underlying dispute was unclear and posed "difficult problems of contract interpretation," 620 F.2d at 136. While noting that a major premise of *Buffalo Forge* was that questions of contract interpretation were not appropriate for the courts, *id.* at 136-37, the appeals court, however, nevertheless engaged in a very lengthy and complex analysis of the parties' contract before it was able to determine that the underlying dispute was over wage rates and thus not an arbitrable issue under *Buffalo Forge*. *See also Mohawk Rubber Co.* v. *United Rubber Workers*, 462 F. Supp. 993 (N.D. Ohio 1978); *American Ship Building Co.* v. *Brotherhood of Boilermakers, Local 358*, 459 F. Supp. 491 (N.D. (Ohio 1978); *Coordinating Committee Steel Co.* v. *United Steelworkers*, 436 F. Supp. 208 (W.D. Pa. 1977); *Eaton Corp.* v. *International Association of Machinists*, 580 F.2d 254 (7th Cir. 1978); *Matson Plastering Co.* v. *Operative Plasterers*, 633 F.2d 1307 (9th Cir. 1980).

Additionally, this Court's recent decision in *Complete Auto Transit* v. *Reis*, 49 U.S.L.W. 4473 (May 4, 1981), demonstrates the lengths to which lower courts have gone in a frustrating search for the correct meaning of *Buffalo Forge*. There the lower courts were confronted with the issue of whether *Buffalo Forge* bars injunctive relief when a dispute which began over a non-arbitrable issue is later "transformed" into a dispute over an arbitrable issue. In that case, the district court held that, under *Buffalo Forge*, if a dispute is not initially "precipitated by" a conflict over an arbitrable issue, injunctive relief is not appropriate. 49 U.S.L.W. at 4474. The Sixth Circuit, however, reversed, cautioning that courts must be concerned with whether the strike is "over" an arbitrable issue at the time they render their decision, and not with whether the strike was originally "precipitated by" an arbitrable dispute. 614 F.2d 1110, 1114 (6th Cir. 1980). The critical fact to the appellate court was that the reason for the work stoppage changed from an intra-union dispute which was found non-arbitrable, to a question of amnesty for the striking employees, a matter clearly arbitrable under the parties' collective bargaining agreement. This Court expressed no view on whether the Sixth Circuit's ruling was correct. 49 U.S.L.W. at 4474 n.4.

In short, the effect of *Buffalo Forge* has been to undermine free collective bargaining with respect to contractual no-strike clauses. Other remedies arguably available to employers for such breaches clearly do not serve as an adequate substitute for immediate equitable relief. 428 U.S. at 418 n.8 (Stevens, J., dissenting).[19] Indeed, one

[19] As noted above, the Court has recently severely cut back on an employer's ability to obtain damages in the case of a strike in breach of a no-strike clause. *Carbon Fuel*, 444 U.S. 212; *Complete Auto Transit*, 49 U.S.L.W. 4473. Moreover, recently the National Labor Relations Board has begun to limit the employer's right to discipline striking workers by finding such

commentator has argued that the "per se" rule adopted in *Buffalo Forge* denies employers who bargained for broad no-strike clauses their contractual expectation of fully uninterrupted production. Gould, 30 Stan. L. Rev. at 546-47. Consequently, as evidenced by the no-strike clause at issue here which, in apparent response to *Buffalo Forge*, permits sympathy strikes, the incentive for employers to negotiate for broad no-strike clauses is diminished to the extent such clauses are not equitably enforceable. Employers without incentive to do otherwise, will negotiate for no-strike clauses only broad enough to prohibit strikes over arbitrable disputes. The logical result will be increased resort to costly industrial strife rather than arbitration as a means of resolving disputes.

This result cuts directly against the goal of the National Labor Relations Act—the promotion of industrial peace through collective bargaining, 29 U.S.C. § 151 (1976). It is also at odds with the policy enunciated by Congress in § 301(a) providing for the enforcement of all labor-management contractual obligations and with that set forth by Congress in § 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1976), insuring workers the right to "exercise actual liberty of contract."

The *Buffalo Forge* Court clearly did not intend that one party to a collective bargaining agreement would be

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attempted enforcement to constitute an unfair labor practice. *See, e.g., Pacemaker Yacht Co.*, 253 N.L.R.B. No. 95 (December 18, 1980); *accord, Amcar Division, ACF Industries*, 247 N.L.R.B. No. 138 (Feb. 14, 1980), *enforcement denied*, 106 L.R.R.M. 2518 (8th Cir., February 9, 1981). The logic of the Board's decision in *Pacemaker Yacht* is that the employees had not specifically waived the right to strike over a particular issue, despite the existence of a broad no-strike clause in the contract. Since the waiver was not explicit, the employer's discharge of employees for violating the no-strike clause was unlawful. *Id.* The import of such decision would plainly leave an employer without recourse in the event of such a strike. *See also Delaware Coca-Cola*, 624 F.2d 1182; *But see Iowa Beef Processors* 597 F.2d 1138, 1145.

permitted to evade its responsibilities with impunity. Permitting pre-arbitration injunctions against strikes that are clearly in violation of a contractual no-strike clause, *Buffalo Forge*, 428 U.S. at 431 (Stevens, J., dissenting), not only permits an employer to have the benefit of his bargain, but is also less destructive of the goals of national labor policy.

The decision of the Fifth Circuit in the *United States Steel Corp.* v. *United Mine Workers*, 519 F.2d 1236, relied upon by the appellate court in this case unequivocally exposes the fallacy of denying an employer injunctive relief. There, the Fifth Circuit observed that the employer faced with a politically motivated strike always had the option of disciplining its work force for failure to work. Acknowledging that such conduct would precipitate further strikes, the Court intimated that such strikes over discipline would then be arbitrable strikes, implying that at that point injunctive relief could be obtained. It need hardly be argued that encouraging an employer to discharge workers in order to precipitate further strikes is flatly at odds with federal labor policy which encourages the peaceful resolution of industrial disputes.

The restriction of availability of other arguably more drastic remedies against strikes in violation of contractual no-strike clauses, *see Carbon Fuel*, 444 U.S. 212 (1979) and *Complete Auto Transit*, 49 U.S.L.W. 4473 (1981), seemingly reflects the Courts' understanding, consistent with the view of the *Boys Markets* Court, that pre-arbitrable injunctive relief poses virtually no threat to the continued stability of labor-managament relations. This is particularly true where arbitration is ordered to be conducted on an expedited basis. *Buffalo Forge*, 428 U.S. at 431 (Stevens, J., dissenting). *See, e.g., American Telephone & Telegraph Co.* v. *Communications Workers*, 75 L.R.R.M. 2178 (S.D.N.Y. 1970) (Frankel, J.).

Permitting injunctive relief in a case of this sort, moreover, should not result in a flood of litigation involv-

ing the federal courts in countless preliminary injunction matters. The predictability which would be afforded by an affirmation of the employer's right to seek judicial enforcement of a no-strike pledge could in fact lessen the number of strikes in violation of no-strike clauses, and keep such cases out of the courts. Furthermore, requiring the district court to determine whether the strike is "clearly in breach" of the no-strike clause involves only a threshhold determination of arbitrability, and not necessarily a decision on the merits of the underlying arbitrable dispute. 428 U.S. at 431 & n.27 (Stevens, J., dissenting).[20]

Judicial enforcement of collective bargaining agreements has become increasingly one-sided. The courts, for example, have readily enforced an employer's obligation to arbitrate disputes, even in certain situations where the grievance arises after the termination on the collective bargaining agreement creating the duty to arbitrate. *Nolde Brothers, Inc.* v. *Local No. 358, Bakery and Confectionery Workers*, 430 U.S. 243, *rehearing denied*, 430 U.S. 988 (1977); *United Steelworkers* v. *Fort Pitt Steel Casting*, 635 F.2d 1071 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3727 (March 16, 1981) (No. 80-1564); *Federated Metals Corp.* v. *United Steelworkers*, No. 80-

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[20] A similar limitation on the potential involvement of federal courts exists in cases in which unions seek temporary injunctions against employer conduct in arguable breach of some provision of the collective bargaining agreement. Conditioning such relief on a clear affirmation on the part of the employer to maintain the status quo regarding the matter in question, pending arbitration, is no more difficult than perusing a contract to determine whether the strike at issue is in violation of a no-strike clause. *See Amalgamated Transit Union, Division 1384* v. *Greyhound Lines*, 550 F.2d 1237 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977). *See Cantor*, 1980 Wisc. L. Rev. at 269-70. *See also United Steelworkers* v. *Fort Pitt Steel Casting*, 598 F.2d 1273 (3d Cir. 1979); *Texaco Independent Union* v. *Texaco, Inc.*, 452 F. Supp. 1097 (W.D. Pa. 1978). *See generally* Smith, 44 U. Chi. L. Rev. at 346-47.

1606 (3d Cir., April 28, 1981), *as printed in* [1981] Daily Lab. Rep. (BNA) E-1 (May 8, 1981). Underlying such decisions, as the Third Circuit observed in *Federated Metals*, is the perception that encouraging the strong federal policy favoring arbitration requires that doubts as to arbitrability be resolved in favor of arbitration, even if the arbitration clause at issue is a narrow one, where the subject matter of a particular grievance is arbitrable. *Id.* at E-2-3. The courts, however, have not shown the same willingness to require, even during the term of a contract, unions to live up to the key promise they make in a collective bargaining agreement, *viz.*, the no-strike pledge, even where such enforcement would serve the identical policy of furthering arbitration.

The result reached by the Fifth Circuit below requires reassessment of *Buffalo Forge*. Its impact is increasingly one of denying an employer effective enforcement of a no-strike pledge, contrary to the objectives of national labor policy. Combined with the ineffectiveness of other remedies, an employer is left, in a case like this one, with no recourse whatsoever. Particularly in the case of a purely political dispute completely unrelated to the purposes of the Norris-LaGuardia Act, Occidental submits that Congress plainly did not intend such a result.

CONCLUSION

Petitioners respectfully pray that this Court reverse the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of May, 1981, three copies of the foregoing Brief For Petitioners were mailed by first class United States mail, postage prepaid, to the following persons. I further certify that all parties required to be served have been served.

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